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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 611

DAVID L. NICHOL,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit.

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DAVID L. NICHOL,
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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on October 10, 1963.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, p. 13.

JURISDICTION

The judgment of the Court of Appeals was entered on October 10, 1963 (Appendix, infra, p. 15). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether an illegal purpose has been shown in a trip from Illinois to Missouri when the Government's evidence establishes that the petitioner and his wife, a prostitute, had gone from Missouri to Illinois to visit their children and were then observed returning from Illinois to Missouri where petitioner's wife had worked as a prostitute.

2. Whether the innocent purpose of a trip can be established from the evidence offered on behalf of the Government.

3. Whether the purpose of a trip, interstate, can be assumed to be illegal when the Government fails to offer positive evidence of the exact purpose of the trip.

4. Whether transportation by the petitioner has been shown when the evidence discloses that in an interstate trip petitioner was a passenger in the automobile which was driven by the person he allegedly transported.

5. Whether a violation of 18 U. S. C. 2421 has been established when there is no direct evidence that any immoral act was committed subsequent to the trip.

STATUTE INVOLVED

United States Code, Title 18, Section 2421:

"Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose

to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or

Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in the District of Columbia or any Territory or Possession of the United States, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce or in the District of Columbia or any Territory or Possession of the United States

Shall be fined not more than $5,000.00 or imprisoned not more than five years, or both."

STATEMENT

Petitioner was convicted by a jury on a one count indictment charging that on or about the 14th day of August, 1961, he did knowingly transport in interstate commerce one Joyce Nichol from East St. Louis, Illinois to St. Louis, Missouri, with the intent and purpose of prostitution in violation of Title 18, U. S. C. 2421. Petitioner was sentenced to five years imprisonment (A. 4).

The error relied upon arises out of the contention that the evidence adduced is insufficient to sustain a conviction (A. 10, 11, 13).

"A" references are to the Appendix on appeal; "S" references are to the supplement to the appendix, titled, "Portions of the Record Not Printed in the Appendix, to Be Referred to as Original Exhibits," which is included in the papers certified by the Clerk of the Seventh Circuit Court of Appeals.

The Government's evidence showed that petitioner and his wife had previously lived in East St. Louis, Illinois, with their two children. It was shown that during June, July and August of 1961 Miss Pauline Pearson of East St. Louis, Illinois, took care of petitioner's children during the week and the petitioner and his wife would visit them on week ends (A. 5, 6).

On July 26, 1961, petitioner rented an apartment in St. Louis, Missouri, being apartment 321 in the Eugene Fields Apartment Building. On the date that the apartment was rented the petitioner was accompanied by his wife (A. 6).

Patricia Long and Judith Gryder prepared for petitioner a list of names of individuals who could be contacted relative to prostitution. Miss. Gryder worked at the apartment with the petitioner's wife as prostitutes. Miss Gryder testified that the petitioner lived at the apartment as far as she knew. Miss Gryder first met the petitioner and his wife in a bar in St. Louis, Missouri, in June of 1961, at which time Miss Gryder agreed to help start a prostitution business for the petitioner with the petitioner's wife. Miss Long stated that she first met the petitioner in the early Spring of 1961, and that she first went up to his apartment in the Eugene Fields Apartment House in June of 1961. On this occasion petitioner was present along with Judith Gryder and the petitioner's wife (A. 7, 8).

Harold E. Boulware, Tom Hoolan and Frank Dubman each testified that they had engaged in an act of prostitution with the petitioner's wife in the Eugene Fields Apartments. Mr. Boulware stated on October 25, 1962 that his affair had been about a year ago and could have been in July or August of 1961. Mr. Hoolan did not specify the time that he had had his affair and Mr. Dubman stated on October 25, 1962 that he didn't know ex-

actly when his affair was, but that it was probably a year and one-half to two years ago. He further stated that he did not know exactly when he was there at the Eugene Fields Apartment, but that perhaps it was in the spring or summer of last year since it was during warm weather. All three of the men stated that they did not know the petitioner and that they had had no dealings with him of any sort (A. 8, 9).

Bernard Hafen, an F. B. I. Agent, saw petitioner and his wife and another individual in an automobile in East St. Louis, Illinois, on August 14, 1961, at which time he followed them and saw their car drive across the Eads Bridge into St. Louis, Missouri. At this time the petitioner was seated in the passenger's seat and the petitioner's wife was driving. Another F. B. I. Agent, Mr. Moreland, spotted the car as it entered Missouri and also followed the automobile. He also stated that petitioner was not driving the automobile, but that his wife was driving. The automobile proceeded out to about the 4000 block of Olive Street at which time the petitioner's wife got out of the car and went into a cafe, and thereafter, went into the Eugene Fields Apartments (A. 9, 10). The petitioner's wife was not called as a witness by the prosecution. The defense offered no testimony.

The government, in summarizing the evidence in its closing argument, pointed out that petitioner and his wife were living in Missouri and had gone to Illinois for the weekend. When observed leaving Illinois and entering Missouri they were, as pointed out by the government, returning to work. The Assistant United States Attorney stated further that they were not going to Missouri to start a prostitution business but were merely returning after a weekend trip to a business which was already established and farther that they were returning to their home in Missouri (A. 12, 13).

The Assistant United States Attorney stated in his closing argument:

"The first witness was Mrs. Pauline Pearson, and she testified yesterday afternoon that she was acquainted with both David Nichol and his wife Joyce, that she baby sat for them for quite a considerable length of time, and did baby sit for them during the summer of 1961. They had two children, a son and a daughter. She further testified, and we think this is significant, that it was during the week that she kept the children all the time, and that occasionally on weekends the Nichols would return, or at least would come and visit the children or take them, but during the week itself she kept the children, and this was in East St. Louis where they had their residence, or at least where they were renting this home" (S. 2).

. . . . . .

"Now, we then had Special Agent Hafen on the stand, and he testified that he followed the defendant David Nichol, Joyce Nichol and Eddie Wallace across the river from East St. Louis to Missouri. And then Agent Morydland got on the stand and said he picked them up from there and followed them out to the Eugene Fields apartment. Now, she was driving, and he was sitting in the car. And let's remember one thing: Agent Hafen said this was on Monday; and Monday is significant, because they had been over to East St. Louis for the weekend; and it is time to go back to work. It is Monday, and let's get back to work, because they didn't work on weekends. And where else were they going to work but St. Louis at the Eugene Fields apartments?

"We have shown to you that prostitution was going on before and prostitution was going on afterwards; and they just came back from East St. Louis to carry

on the same thing that had been going on for some time. Now, they didn't leave East St. Louis and go to St. Louis to start this business up. It was already in operation. But on this occasion the F. B. I. followed them across, straight to there.

"Now, we don't claim and no one testified that on August 14th a prostitution date was fulfilled as soon as she got into the apartment, but we don't have to prove that. We have to prove beyond a reasonable doubt to your mind that the purpose for the trip was prostitution and the only purpose that they had in going over there was to go back there to live, because they stayed at the apartment. He slept there, and she slept there. They stayed there. That was their home. And they left from over here to go back to home as far as they were concerned. And during this period of time that is where they lived, and it just so happened that was their occupation." (A. 12-13).

. . . . . .

"We don't know what was in the defendant's mind during this period of time of this transportation or when he got over there. But the Court will instruct you on what is intent and what is circumstantial evidence. And the circumstances of his living in St. Louis, his coming back to East St. Louis, his baby sitter—the baby sitter, alone, if we just put the baby sitter on the stand and asked you to convict somebody, that would be trying your intelligence. But she fits into the case. Each one of them, everybody, had a little bit to add. We didn't put them on the stand just to take up time. Everybody had something to prove. I think we have proven beyond a reasonable doubt in any of your minds that David Nichol was guilty and is guilty of this offense, and that should be your verdict. Thank you" (S. 2).

. . . . . .

REASONS FOR GRANTING THE WRIT

1. The decision of the Seventh Circuit below is in conflict with several decisions handed down by this Court. This Court held in **Mortenson v. United States**, 322 U. S. 369, that there was no violation of 18 U. S. C. 2421 when the appellant, who operated a house of prostitution, went on a trip with two of his employees across state lines. This Court held that if the trip was innocent at its inception, it was innocent on its return. Even though it could be assumed that the defendant anticipated that the girls would return to work as prostitutes, the Court held, it could not be assumed that the trip was for the purpose of facilitating these activities.

In the instant case the Government offered no direct or positive evidence as to the purpose of the trip in question but did show that it was customary for petitioner and his wife to travel from Missouri to Illinois on weekends to visit their children. From this the prosecutor argued that on the Monday, August 14, 1961, when they were observed traveling from Illinois to Missouri that they were returning to work from a weekend visit to Illinois.

This summary by the Assistant United States Attorney was consistent with the evidence presented by the Government. Miss Pearson, the baby sitter, called as a witness by the government, served only one purpose and that was to show that on weekends petitioner and his wife would come to Illinois to visit their children whereas during the week she cared for the children.

The Court below held that the facts of the instant case are distinguishable from **Mortenson** since there was no evidence establishing that the trip was innocent at its inception. The Court did state, however, "A baby sitter

gave testimony from which it could be inferred that defendant and his wife were in Illinois to visit their children living there. But there was no testimony that that was the purpose of the trip in question" (Appendix, infra, p. 15). If there was no testimony that the purpose of the trip was to visit their children, there is certainly no testimony that this was not the purpose of the trip or that there was any other purpose for the trip. The prosecution as indicated earlier argued from the evidence that the purpose of the trip was the weekend in Illinois. The Court below takes a position that since there was no direct evidence of the purpose of the trip that it has therefore been established that the purpose was illegal. This Court, however, stated in **Hansen v. Hoff**, 291 U. S. 562, 563, "People not of good moral character, like others, travel from place to place and change their residence. But to say that because they indulge in illegal or immoral acts, they travel for that purpose, is to emphasize that which is incidental and ignore what is of primary significance."

This Court reversed the conviction in **United States v. Oriolo**, 324 U. S. 824, reversing 146 F. 2d 153, where the defendant had taken a prostitute for a trip across a state line and was thereafter arrested and his automobile seized. The defendant then purchased a return ticket for himself and the prostitute telling her that it would be necessary for her to return to work to make money to pay his fine. The Appellate Court held that this case was distinguishable from **Mortenson** on these facts and, therefore, affirmed the conviction. This Court, however, reversed per curiam citing only **Mortenson**. Similarly in **Becker v. United States**, 348 U. S. 957, reversing 217 F. 2d 555, the Appellate Court held the facts to be distinguishable from **Mortenson** when the prostitute left to visit her mother and then decided not to return. Thereafter the

defendant convinced her to return to work as a prostitute. The Appellate Court held that the innocent trip was therefore broken and affirmed the conviction. This Court again, however, citing only **Mortenson** reversed per curiam.

The Second Circuit in **United States v. Ross**, 257 F. 2d 292, reversed a conviction where the defendant and a prostitute went from New York to New Jersey for week ends and upon her return the prostitute went back to her illegal activity. The Court there reasoned that there was no showing that the trip had anything to do with her activities as a prostitute.

In the instant case there is also no showing that the trip was in any way connected with the prostitution. The only purpose shown for the trip from Missouri to Illinois and then the return trip from Illinois to Missouri dealt with visiting the children of petitioner. The opinion of the Court below, therefore, affirming the conviction of the petitioner is in direct conflict with the opinion of this Court in **Mortenson** and also in direct conflict with the orders entered in **Oriolo** and **Becker**. It is, therefore, earnestly contended that it is necessary for this Court to review the decision below to determine if the facts of the instant case are not in fact consistent with the ruling of this Court in **Mortenson**.

2. The Court below holds that the evidence supports an inference that the petitioner transported his wife during the trip in question. The facts, however, show that petitioner was merely a passenger in the automobile being operated by his wife. Furthermore, the facts in no way show that upon completion of the trip of August 14, 1961, or thereafter, the petitioner's wife engaged in prostitution.

None of the three witnesses who testified for the Government that they had engaged in an act of prostitution

with the petitioner's wife stated that this act occurred subsequent to the 14th of August, 1961. Mr. Boulware stated that his affair could have been in July or August of 1961. Mr. Hoolan did not state when he had an affair with petitioner's wife and Mr. Dubman stated that he didn't know when his affair was, but that perhaps it was spring or summer of 1961 since the weather was warm.

Based upon the above evidence the Government contended that transportation for an illegal purpose had been shown when in fact there was no actual transportation shown and there was no illegal purpose shown. Petitioner was merely a passenger in an automobile operated by his wife across the state line and there was no evidence that subsequent to the interstate trip the wife of the petitioner engaged in any illegal activities.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted.

NORMAN S. LONDON,
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St. Louis, Missouri.

BERNARD J. MELLMAN,
408 Olive Street,
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Attorneys for Petitioner.

APPENDIX.

INDICTMENT

(Filed June 22, 1962.)

In the District Court of the United States of America for the Eastern District of Illinois.

United States of America, Plaintiff,	Criminal No. 19,509,
vs.	Section 2421,
	Title 18,
David L. Nichol, Defendant.	United States Code.

The Grand Jury charges:

Count I.

That David L. Nichol, hereinafter called the defendant, on or about August 14, A. D. 1961, did knowingly transport in interstate commerce one Joyce Nichol, who was then and there a woman, from East St. Louis, in the County of St. Clair, in the Eastern District of Illinois, to St. Louis, in the State of Missouri, with the intent and purpose then and there on the part of him, the said defendant, to induce, entice and compel the said Joyce Nichol to give herself up to prostitution and debauchery and to engage in other immoral practices.

A True Bill.

(Signed) Luther H. Beggs,
Foreman.

(Signed) Carl W. Feickert,
United States Attorney.

Bond $5,000.00

OPINION

In the
United States Court of Appeals
For the Seventh Circuit

No. 14473

September Term, 1963 — September Session, 1963

United States of America,
Plaintiff-Appellee,

v.

David L. Nichol,
Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Illinois

October 10, 1963

Before Duffy, Schnackenberg and Kiley, Circuit Judges.

Kiley, Circuit Judge. Defendant appeals from his conviction by a jury of a violation of the Mann Act[1] on August 14, 1961.

---

[1] 18 U.S.C. § 2421 provides in pertinent part:

Whoever knowingly transports in interstate or foreign commerce, . . . any woman or girl for the purpose of prostitution . . . shall be fined not more than $5,000 or imprisoned not more than [illegible] years, or both.

The issue is whether the verdict is justified upon evidence that defendant and his wife lived in Illinois; that defendant, on July 29, 1961, rented an apartment in Missouri for the purpose of having his wife engage in prostitution; that they lived in the Missouri apartment thereafter for that purpose; that subsequently they were in Illinois; and that on Monday, August 14, 1961, defendant's wife drove from Illinois to the Missouri apartment, accompanied by defendant in the rear seat, and by another man.

On the issue we take the view of the evidence most favorable to the Government, and if there is substantial evidence to support the jury verdict it must be sustained. **Glasser v. United States**, 315 U. S. 60, 80 (1942). **United States v. Nichols**, __ F. 2d __ (7th Cir., No. 13971, September 18, 1963).

Defendant argues that an essential element of proof is lacking because defendant was merely a passenger in the automobile on August 14, and that there was no evidence that he was responsible for the transportation for prostitution. The uncontradicted evidence establishes that the defendant set his wife up in prostitution in Missouri in July, and accompanied her on the trip from Illinois to Missouri on August 14. The purpose of the trip of August 14 reasonably may be inferred from that evidence to have been for the resumption of prostitution. **Lindsey v. United States**, 277 F. 2d 113, 117 (5th Cir. 1955), and was enough for the jury's inference that he assisted in the arrangement for the return trip from Illinois. **Wright v. United States**, 175 F. 2d 384 (8th Cir. 1949). Defendant should not escape the consequences by taking a back seat.

Defendant also argues that this was an "innocent round trip" so as to fall within the rule of **Mortensen v. United States**, 322 U. S. 369 (1944). There were no defense wit

nesses and no testimony to establish the "innocent" purpose of the trip in question. The Government proved the elements of its case by its proof of the establishment of the house of prostitution in Missouri and the transportation of defendant's wife from Illinois to the house of prostitution in Missouri on August 14, 1961. A babysitter gave testimony from which it could be inferred that defendant and his wife were in Illinois to visit their children living there. But there was no testimony that that was the purpose of the trip in question. There is no evidence to establish that the trip was innocent when it began, or that the trip of August 14 was an integral part of an innocent round trip. This lack of proof distinguishes **Mortensen v. United States**, 322 U. S. 369 (1944), **Oriolo v. United States**, 324 U. S. 824 (1945), reversing 146 F. 2d 153 (3d Cir. 1944), and **United States v. Ross**, 257 F. 2d 292 (2d Cir. 1958).

The conviction is Affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

Judgment.

United States Court of Appeals,
For the Seventh Circuit.

Thursday, October 10, 1963.

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

United States of America,
Plaintiff-Appellee,
No. 14173 vs.
David L. Nichol,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Illinois.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this court filed this day.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

DAVID L. NICHOL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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HERBERT J. MILLER, JR.,
Assistant Attorney General,

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In the Supreme Court of the United States

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DAVID L. NICHOL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 13-15) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1963. The petition for a writ of certiorari was filed November 9, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence is sufficient to support petitioner's conviction of the interstate transportation of his wife for the purpose of prostitution.

STATEMENT

Petitioner was convicted in the United States District Court for the Eastern District of Illinois on one count charging that on August 14, 1961, he transported his wife in interstate commerce from East St. Louis, Illinois, to St. Louis, Missouri, for the purpose of having her engage in prostitution.

The government's evidence showed that in the spring of 1961, petitioner asked a prostitute in St. Louis to give him a list of potential customers, saying that he intended to go into the business (Tr. 67-68).[1] On July 26, 1961, petitioner rented a one room apartment in the Eugene Fields Apartment house in St. Louis, Missouri, for which rent was paid until some time in September (Tr. 14, 69). A prostitute named Judith Gryder agreed to help petitioner start the business (Tr. 65, 68). She worked with another girl who left a few days later. Petitioner then brought his wife whom he described as a "good hustler" to work with Mrs. Gryder (Tr. 70-72). Mrs. Gryder and petitioner's wife used the apartment for prostitution for about three or four weeks (Tr. 72, 81). Mrs. Gryder worked four or five days a week

[1] The citation is to the full transcript of the trial, a copy of which is being filed with the Clerk of the Court.

(Tr. 82-83). Mrs. Gryder would find petitioner sleeping in the apartment when she came there in the morning (Tr. 74). Two men testified to relations with petitioner's wife as a prostitute at the Eugene Fields Apartments in the summer of 1961, without being able to specify the date (Tr. 97-99, 103-104; see 100-102).

Petitioner and his wife, who had two children, had a rented house in East St. Louis, Illinois (Tr. 6-7). The woman who lived next door did baby-sitting for them. During the summer 1961 she kept the children day and night during the week and the mother would come and get them on weekends (Tr. 8-9).

On Monday, August 14, F.B.I. agents observed a car pull away from a riding stable in East St. Louis. Petitioner was seated next to his wife, who was driving; another man was in the back seat (Tr. 115-116). The car crossed over into St. Louis, Missouri, and stopped in front of a cafe. Petitioner's wife got out and petitioner moved into the driver's seat and drove off. His wife went into a cafe and then entered the Eugene Fields apartment building (Tr. 116-117, 120-121).

ARGUMENT

From the evidence summarized in the Statement, the inference is not only justifiable, but almost inevitable, that when petitioner and his wife drove from East St. Louis, Illinois, to St. Louis, Missouri, the purpose of the transportation was to have the wife go to her work as a prostitute in the Eugene Fields Apartment, the place which petitioner had rented

solely and specifically for the purpose of having it used in the business of prostitution. The fact that the apartment to which they drove was the business place selected by petitioner for his wife's prostitution activities serves, we think, to distinguish this case from *Mortensen* v. *United States*, 322 U.S. 369, and the cases following it on which petitioner relies.

The one room apartment in the Eugene Fields Apartment was not the home of petitioner and his wife, even though petitioner may have slept there during the week. They had a home and children in East St. Louis. Hence, this is not the situation in *Mortensen* or the other cases following it, where the purpose of the transportation charged was to return the woman to the place where she lived, which happened to be a place where she practiced prostitution. Here the only reason for going to the apartment house was to proceed with the business of prostitution. Certainly, the jury could reasonably infer that when, on a Monday morning, petitioner and his wife drove from Illinois, where they had a house and children, to St. Louis where petitioner had put his wife in the prostitution business, the purpose of the interstate trip was the conduct of that business. In other words the particular transportation here proved was specifically motivated by the purpose of commercial prostitution condemned by the Mann Act.

The other contentions as to the insufficiency of the evidence are without merit. Petitioner was the one who set up the business, obtained the list of customers, and brought his wife in after the business had been going for a short time. He was thus the

one who caused his wife to travel to St. Louis for the purpose of engaging in prostitution. Hence the fact that he did not himself do the driving is unimportant. *Brown* v. *United States*, 314 F. 2d 293 (C.A. 9).

There is no foundation for the contention that there was an absence of proof that the apartment was used for prostitution activities after August 14, since the men who testified could not be specific as to dates. Mrs. Gryder, who helped petitioner start the business, testified that she worked at the apartment with petitioner's wife for three or four weeks. Since the apartment was rented on July 26 and since petitioner's wife did not go to work there until a few days thereafter, this testimony fully justified the conclusion that the apartment was being used for prostitution by petitioner's wife during the week commencing August 14.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

DECEMBER 1963.

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REPLY BRIEF FOR THE PETITIONER.

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REPLY BRIEF FOR THE PETITIONER.

The Government's brief in opposition asserts certain conclusions which are not supported by the record. The Government argues that the apartment at the Eugene Fields Apartment Building was a one-room apartment in an effort to show that the apartment was not the home of the petitioner and his wife. The description of the apartment, however, was given by a Government witness as follows:

"It was a very small bedroom-living-room combination, small dressing room, that the bed would fold up into, a bathroom, and a kitchen, very tiny." Tr. 601.

The Government further argues that the petitioner and his wife had a rented house in East St. Louis, Illinois, and apparently concludes that this house was rented during the period of time in question and that, therefore, the

house in East St. Louis was in fact the home of the petitioner. The only testimony concerning the petitioner's living in East St. Louis came from Mrs. Pearson, a Government witness. In the direct examination of Mrs. Pearson the following occurred:

"Q. Where did you know Mr. and Mrs. Nichols lived?

A. They lived at 212 North 25th Street.

Q. Whereabouts is that?

A. That is in East St. Louis." (Tr. 6).

It is apparent from the previous questions and answers that the word "lived" is in the past tense and did not refer specifically to the time of the alleged offense. Also during the direct examination of Mrs. Pearson the following occurred:

"Q. Do you know, of your own knowledge, where they were living during July and August of 1961?

A. Well, they moved away. After they moved away I didn't know where they lived." (Tr. 9).

From the above the Government seeks to distinguish the instant case from **Mortenson v. United States**, 322 U. S. 369, and related cases, by arguing that the home of the petitioner was in East St. Louis and not in St. Louis. There is certainly no basis for such a distinction to be found in **Mortenson** and the facts equally do not support such a distinction.

The theory now advanced by the Government is certainly a direct departure from the theory advanced by the Assistant United States Attorney at the trial of this cause. During his closing argument the Assistant United States Attorney stated:

"Now, we don't claim and no one testified that on August 14 a prostitution date was fulfilled as soon as she got into the apartment, but we don't have to prove that. We have to prove beyond a reasonable doubt

> to your mind that the purpose for the trip was prostitution and the only purpose that they had in going over there was to go back there to live, because they stayed at the apartment. He slept there, and she slept there. They stayed there. That was their home. And they left from over here to go back to home as far as they were concerned. And during this period of time that is where they lived, and it just so happened that was their occupation". (A. 12-13; Tr. 132-133)

Certainly from the above it is apparent that the Government conceded that the evidence disclosed that petitioner and his wife made their home in St. Louis, Missouri, at the Eugene Fields Apartments.

The Government's brief asked that the jury be allowed to infer that the purpose of the trip from Illinois to Missouri was to have petitioner's wife return to work as a prostitute; to infer that the purpose of the trip was the conduct of a prostitution business; to infer that the petitioner caused his wife to travel to Missouri for the purpose of prostitution; and to infer that the apartment was being used for prostitution during the week commencing August 14. The Government asks that all of these items be inferred; although there is no evidence proving any one of them.

It is apparent from the Government's brief in opposition and the abandonment of the Government's trial theory that the evidence in the instant case is insufficient and the petitioner's motion for judgment of acquittal should have been sustained.

Respectfully submitted,

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